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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE INC., a Delaware corporation, Plaintiff, v. AFFINITY ENGINES, INC., a Delaware corporation, Defendant.	CASE NO.: C-05-00598 JW (HRL) **PLAINTIFF GOOGLE INC.'S OPPOSITION TO DEFENDANT AFFINITY ENGINES, INC.'S MOTION FOR FURTHER CASE MANAGEMENT CONFERENCE RE: SCOPE OF BRIN AND PAGE DEPOSITIONS** Date: December 5, 2005 Time: 9:00 Judge: Hon. James Ware Courtroom: 8, 4th Floor

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I. INTRODUCTION

Affinity Engines, Inc.'s ("AEI's") Motion for Further Case Management Conference ("CMC") is nothing more than a mis-titled and improper motion for reconsideration of this Court's prior Orders. Specifically, this Court has already heard AEI's arguments in two prior CMCs regarding the scope of proposed depositions of Larry Page and Sergey Brin, Google Inc.'s co-Presidents. At the first CMC, this Court limited the scope of the Brin and Page depositions to specific "copyright factual issues" that AEI was instructed to provide to Google in a deposition notice. When AEI ignored the Court's directive and refused to identify the specific copyright issues the deposition would be limited to, the Court convened a second CMC exclusively devoted to the issue of the scope of the Page and Brin depositions. At the second CMC, after argument of counsel, this Court rejected AEI's claim that it required depositions of Messrs. Brin and Page on a wide range of topics, and instead expressly limited the scope of any depositions of Page and Brin to the single issue of an alleged meeting between Orkut Buyukkokten and Google's co-Presidents just before Buyukkokten started at Google. Now, AEI has requested a third CMC for *the same day* that it has noticed a hearing on this Motion, hoping to force the Court to again reconsider the exact same issue.

AEI's Motion fails on numerous grounds. First, AEI entirely failed to comply with the Local Rules of the Northern District of California regarding attempted motions for reconsideration:

Violation of L.R. 7-9(a): AEI failed to file the required motion for leave to file a motion for reconsideration. Instead, it filed the motion for reconsideration itself, as a mis-titled Motion for Further CMC, depriving Google of the protections of L.R. 7-9(d) and forcing Google to respond even though the Court did not grant leave;

Violation of L.R. 7-9(b): AEI failed to provide any new grounds for reconsideration of this Court's prior Orders regarding the depositions of Brin and Page, entirely ignoring the requirements that it do so;

Violation of L.R. 7-9(c): AEI's Motion is replete with the exact same arguments that it made and that this Court rejected in the prior CMCs on the topic of the Brin and Page depositions. Pursuant to L.R. 7-9(c), AEI's conduct in doing so is "subject to appropriate sanctions."

AEI's Motion is properly denied on any of these grounds. It is also substantively defective. This Court has already recognized that Brin and Page's purported knowledge of AEI, of Buyukkokten or of the ClubNexus and inCircle software has no bearing on the issue of copyright ownership – which is the sole issue to be briefed in Google's forthcoming motion for partial summary judgment. AEI's Motion provides nothing new in this regard – in tacit recognition, AEI's Motion provides no explanation as to why the information it demands bears on copyright ownership. Nor does AEI at all attempt to establish that wide-ranging depositions of the two top executives of a $100 billion company are the least-burdensome method of obtaining any discovery it claims to need. Finally, AEI's explanation that it is requesting this third CMC pursuant to Federal Rule of Civil Procedure 56(f) in anticipation of Google's *not-yet-filed* Motion for Summary Judgment on copyright ownership is absurd. If AEI believes there is justification for a Rule 56(f) Motion, it can file one – after Google actually files its Motion for Summary Judgment. AEI's motion for reconsideration should be denied and the Court should issue an Order to Show Cause as to why AEI should not be sanctioned for its conduct.[1]

II. BACKGROUND FACTS

A. Google's Federal Court Action Against AEI Concerns Issues Of Copyright Law

Google alleges in this lawsuit that it owns the copyright to the inCircle source code written by its employee Buyukkokten, based on an employment and inventions assignment agreement that Mr. Buyukkokten executed as a condition of his Google employment and based on copyright law's work-for-hire doctrine. Google also claims that defendant AEI has infringed, and continues to infringe, the copyright in inCircle by reproducing, distributing and creating

[1] AEI's Motion should be denied on the papers as improperly filed without leave of Court – AEI should not be rewarded with a hearing on this Motion that it can then turn into an argument on reconsideration.

derivative works of inCircle in the form of various social networking services it has deployed for alumni associations.[2]

B. Larry Page And Sergey Brin Are Co-Presidents Of Google

Larry Page and Sergey Brin are co-founders and co-Presidents of Google, Inc. Kramer Decl., Ex. G at ¶ 1. Together, Mr. Page and Mr. Brin built Google into a world-wide phenomenon, employing more than three thousand people. *Id.* at ¶ 2. Google's worth by market capitalization is currently over $100 billion. Mr. Page is Google's President of Products, and Mr. Brin is Google's President of Technology, and both are members of the company's board of directors. *Id.* at ¶ 3. Messrs. Page and Brin are heavily involved in the day-to-day operations of the company. *Id.* Each works at least sixty hours a week, and is responsible for general oversight, control and decision-making within the company. *Id*. at ¶ 4. In short, Mr. Page and Mr. Brin are recognized as the heart, soul and face of Google.

C. The Scope Of Topics For The Page And Brin Depositions Were Previously Addressed In The Co-Pending State Court Action

AEI first sought Messrs. Brin and Page's depositions in an ongoing state court action it filed against Google. According to AEI's suit, it owns Mr. Buyukkokten's work and Google "misappropriated" alleged trade secrets in its own employee's work. AEI first contacted Google's counsel to schedule the depositions of Google's co-Presidents in that action months ago. Google advised that neither Mr. Brin nor Mr. Page had unique or superior knowledge of any relevant information, thus the proposed "apex" depositions were improper. AEI rejected this and pressed its claim for the depositions of Google's top executives. Unfortunately, Google was forced to file a motion for a protective order regarding the "apex" depositions. After extensive briefing on the issue and a hearing on May 27, 2005, the state court issued a protective order requiring AEI to take the depositions of Marissa Meyer, Orkut Buyukkokten and Google's corporate designee before it would be allowed to depose Mr. Page or Mr. Brin. Kramer Decl., ¶

[2] Google also seeks a declaration that (1) it owns the copyright to inCircle, and (2) defendant AEI's purported copyright registration for inCircle is invalid.

2, Ex. A. The court also limited any eventual depositions of Mr. Page and Mr. Brin solely to the issues of (1) ownership of the software at issue; (2) Google's hiring of Mr. Buyukkokten; and (3) Google's decision to convert Mr. Buyukkokten's prototype software, which plaintiff claims it owned. *Id.*

After Google prevailed in obtaining the protective order in state court, AEI's litigation tactics compelled Google to go back to court to enforce the terms of the order. Specifically, on July 6, 2005, AEI noticed the depositions of Mr. Page and Mr. Brin for August 24 and August 26. But, by August 18, 2005, in derogation of the protective order, AEI had still not completed the deposition of Mr. Buyukkokten or the corporate deposition of Google. Thus, Google was forced to seek a second protective order prohibiting the depositions of Mr. Page and Mr. Brin prior to completion of the depositions of Mr. Buyukkokten and Google. After full briefing on an expedited schedule and another hearing, the court granted Google's motion to enforce the existing protective order. Kramer Decl., ¶ 6, Ex. B. To date AEI has not completed the depositions of Mr. Buyukkokten or Google's PMK. Rather than comply with the state court orders, AEI changed forums, bringing its improper demand for wide-ranging depositions of Google's founders to this Court.

D. This Court Has Twice Previously Considered and Adjudicated The Scope Of Topics For The Page And Brin Depositions

AEI began its efforts in this Court to obtain unfettered access to Google's two top executives at a CMC held on September 26, 2005. Google objected, and after extended argument, the Court instructed AEI to "specify the copyright factual issues to which the deposing party wishes deponents to answer questions." Kramer Decl., ¶ 3, Ex. C (emphasis added). Presciently, the Court also set a further CMC on this issue for October 17, 2005 in case the parties were unable to agree on the issues for the deposition. *Id.*

The Court's second scheduled CMC on this issue turned out to be necessary. After the September CMC, AEI sent a letter to Google making clear that it intended to ignore this Court's September 29, 2005 Order requiring AEI to specify the "copyright factual issues" for the proposed depositions. Kramer Decl., ¶ 4, Ex. D. Instead, AEI stated that it intended to depose Mr. Page and Mr. Brin on topics beyond what the court permitted in its September 29, 2005 scheduling order and even beyond what AEI was permitted to depose Brin and Page on in the state court matter (once AEI completed the prior required depositions). *Id*. AEI listed a broad range of topics for the depositions and, implicitly conceding that the broad topics were not relevant to copyright ownership, AEI also stated that "per Judge Ware's order AEI is also entitled to explore the 'copyright factual issues.'" *Id*. In contravention of the Court's Order, AEI refused to provide any specificity about the alleged "copyright factual issues." *Id*.

AEI's gamesmanship necessitated the previously-scheduled second case management conference on October 17, 2005. That CMC was exclusively devoted to clarifying the specific copyright factual issues on which AEI could depose Mr. Page and Mr. Brin under the September 29 Scheduling Order. At the CMC, this Court permitted AEI a second opportunity to explain why it needed to depose Mr. Page and Mr. Brin on topics well beyond the scope of testimony relevant to the copyright issues. Kramer Decl., ¶ 5. The Court heard argument on the matter for a half-hour, and AEI presented the same positions it offered in the first CMC – demanding an extensive deposition well beyond what might be relevant to resolving questions of copyright ownership. *Id.* After an extended discussion of the issue of the Page and Brin depositions and relying on AEI's representations during the CMC, this Court expressly narrowed the scope of the proposed depositions to a single issue:

> In light of the parties' representations, this Court limits the scope of the deposition for Larry Page and Sergey Brin to the single issue of their meeting with Orkut Buyukkokten.

Kramer Decl., Ex. E. Google then promptly offered Mr. Page and Mr. Brin for deposition on the issue of the meeting with Mr. Buyukkokten. Kramer Decl., ¶ 5, Ex. F.

Now, in its present "Motion for Further CMC," AEI asks the Court to reconsider its rulings in the prior two CMCs. AEI claims that in order to respond to arguments that it claims will be raised in a summary judgment motion that Google *has not yet submitted*, AEI needs to depose Mr. Page and Mr. Brin on a broader set of issues than the meeting with

Mr. Buyukkokten. It requests that the court hold a *third* CMC to discuss expanding the scope of the Page and Brin depositions on December 5, 2005. And, AEI noticed the hearing on this Motion requesting the CMC for the same day that it requests the CMC itself, which is entirely impractical. In effect, AEI is blatantly attempting to force the issue of a third discussion of the deposition topics. However, AEI fails to offer any justification for a reconsideration of the Court's prior rulings – indeed, AEI attempts to duck the issue by failing to acknowledge that its Motion for a CMC is really just a motion for reconsideration in disguise.

III. ARGUMENT

A. AEI's Motion For A Further CMC Fails On Procedural Grounds

By its Motion, AEI asks the court to grant a "Motion for Further CMC" to address the scope of Mr. Brin's and Mr. Page's depositions. But, the court already addressed the extent of the Brin and Page deposition topics on two prior occasions. Thus, AEI's Motion is nothing more than a request for reconsideration of the Court's prior rulings and AEI's motion must fail because AEI did not comply with the Court's strict guidelines for motions for reconsideration pursuant to Local Rule 7-9.

Because AEI's Motion for Further CMC is actually a motion for reconsideration, it must comply with the local rules for filing a motion for reconsideration. Specifically, Local Rule 7-9(a) holds that a party filing a motion for reconsideration must first seek leave of court:

> Before the entry of a judgment adjudicating all of the claims and the rights and liabilities of all the parties in a case, any party may make a motion before a Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any interlocutory order made by that Judge on any ground set forth in Civil L.R. 7-9(b). No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion.

Civil L.R. 7-9(a) (2005). AEI's Motion for Further CMC, for which it did not seek or obtain leave of Court, is properly stricken for noncompliance with the Local Rules.

B. Any Motion For Leave To File A Motion For Reconsideration Would Fail Under The Local Rules

Furthermore, even if AEI had properly sought leave of Court to file a motion for reconsideration in compliance with the Local Rules, AEI's motion for leave would fail. First, Local Rule 7-9 expressly provides that, in order to obtain leave for reconsideration of an Order, a party must establish (1) material existing facts that the party did not know at the time of the Order; (2) new material facts or a change in law since the issuance of the Order; or a "manifest failure" by the Court to consider facts or law that were presented to the Court by the party prior to issuance of the Order. L.R. 7-9(b). Further, Local Rule 7-9(c) also expressly provides that "[n]o motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered. Any party who violates this restriction shall be subject to appropriate sanctions." Civil L.R. 7-9(c) (2005).

AEI has entirely ignored all of these requirements and restrictions. Indeed, all that AEI has done in its present motion is engage in sanctionable conduct. AEI does not even try to pretend that there are any new issues of fact or law at issue in its currently pending Motion. Instead, AEI repeats the same arguments it made before the Court in the two prior CMCs. Merely mislabeling its Motion as a request for a further CMC rather than a Motion for Reconsideration does not save AEI from a finding that it has engaged in sanctionable conduct under L.R. 7-9(c).

C. AEI's Motion Fails On The Merits As Well

While Google believes that it should not be required to brief the issue of the substantive defects in AEI's requests to endlessly reargue the scope of the Brin and Page depositions, nevertheless, AEI's Motion for Further CMC is substantively defective on several grounds.

First, it is beyond dispute that Mr. Page and Mr. Brin, as the co-Presidents of Google, are heavily involved in all aspects of managing the company on a day-to-day basis. *See, e.g.,* Kramer Decl., Ex. G. Courts have repeatedly held that where a party seeks to depose a corporate executive, the party must demonstrate that it may not obtain the claimed discovery through less burdensome means (such as 30(b)(6) depositions, interrogatories, depositions by written question or depositions of others). *See Folwell v. Hernandez*, 210 F.R.D. 169, 173-74 (M.D.N.C. 2002); *Baine v. General Motors Corp.*, 141 F.R.D. 332, 334-36 (M.D. Ala. 1991); *Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1289 (Cal. App. Ct. 1992). Here, AEI seeks to take Mr. Page and Mr. Brin away from their important duties at Google, only to depose them on an extremely broad range of topics that are irrelevant to the issue of copyright ownership. AEI's "Motion for Further CMC" provides no justification for these apex depositions. Indeed, AEI never addresses the issue of whether the claimed discovery can be obtained by a less-intrusive method than deposing both of Google's co-Presidents.

More importantly, AEI has no justification for the proposed wide-ranging depositions in this matter. As this Court already decided, none of the additional topics AEI recites in its Motion for the Brin and Page depositions have any demonstrable bearing on the issue of copyright ownership. AEI's allegation that Brin, Page and Buyukkokten all went to Stanford at the same time or AEI's allegations of Brin and Page's knowledge regarding AEI or of Buyukkokten's relationship with AEI (*see* Motion at 4) are entirely irrelevant to the subject of Google's motion for summary judgment – Google's written transfer of copyright ownership from Buyukkokten to Google.[3] Indeed, AEI conceded as much in its October 11, 2005 letter to Google, where it stated that it wished to depose Brin and Page on all of the issues it discusses in its present Motion *in addition to* the "copyright factual issues" that this Court suggested it might have permitted.[4] *See* Kramer Decl., Ex. D.

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[3] The law is quite clear that every transfer of copyright ownership must be in writing. *See* 17 U.S.C. § 204(a); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) ("Copyright law dovetails nicely with common sense by requiring that a transfer of copyright ownership be in writing. [...] The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so."). None of AEI's additional proposed topics for deposition even tangentially bear on this issue.

[4] In addition to being irrelevant, AEI's sweeping claims regarding Brin's and Page's knowledge of AEI and its alleged interest in ClubNexus and inCircle are suspect. For example,

(continued...)

Relatedly, AEI's appeal to Rule 56(f) is meritless. First, Google has not yet filed its Motion for Summary Judgment on copyright ownership. AEI's speculation about issues of proof it may have that might implicate Messrs. Page and Brin in responding to Google's pending Motion cannot provide a basis for reconsideration of this Court's prior Orders. Rather, Rule 56(f) requires AEI to establish that it requires specific discovery essential to its opposition. AEI cannot do so, and certainly not at this stage. But, AEI cannot short-circuit the requirements of Rule 56(f) (and Rule 56(g) regarding bad-faith affidavits) by forcing a CMC onto the schedule without ever providing any legal justification for the relevance of any discovery in light of Google's (yet-to-be-filed) motion for partial summary judgment.

For these reasons, even if this Court were inclined to grant AEI leave to file a motion for reconsideration of the issue and the parties briefed that issue, AEI would not prevail in expanding the scope of the Brin and Page depositions.

IV. CONCLUSION

For the foregoing reasons, Google, Inc. respectfully requests that the Court deny AEI's Motion for Further CMC.

Dated: November 14, 2005

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the Court-appointed Discovery Master in the co-pending state court matter recently noted that "[i]ndeed, the evidence suggests that AEI deliberately avoided informing Google of its [alleged] interest in Club Nexus and inCircle." To the extent AEI is simply seeking state-court discovery in this federal matter, AEI's effort to subvert the state court's discovery orders regarding the Brin and Page depositions should be denied.